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ABSTRACT

This paper examines the question of whether the religious broadcasting industry has indirectly received unconstitutional aid from the Federal Communications Commission (FCC). It reviews individual FCC cases involving religious programing and religious broadcasters, the constitutional meaning of the establishment clause, and the limits the courts have set on governmental relationships with religion. The paper is divided into six major sections dealing with (1) the establishment clause, (2) the FCC and the religion issue, (3) comparative hearings on religious programing proposals, (4) fairness doctrine complaints about religious programs, (5) petitions to deny renewal and transfer applications, and (6) ownership of religious broadcasting agencies. The final section concludes the analysis and states that there is no evidence that the FCC has contributed to the establishment of religion. (AEA)

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RELIGIOUS BROADCASTING, THE ESTABLISHMENT CLAUSE, AND FEDERAL COMMUNICATIONS COMMISSION REGULATORY POLICY

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RELIGIOUS BROADCASTING, THE ESTABLISHMENT CLAUSE,
AND FEDERAL COMMUNICATIONS COMMISSION REGULATORY POLICY

FCC Commissioner Lee Loevinger, in a series of books, articles, speeches and interviews during the mid-1960s,[1] urged that the FCC's relationship with religion was excessive, violating the First Amendment's Establishment Clause.[2] His central thesis was:

> The FCC rushes in where other government agencies are forbidden to tread when it, at least implicitly, requires religious programming and determines that a certain amount of religious broadcasting is or is not adequate or excessive, or that the public interest is or is not served by the broadcasting of particular views on religion or of the views of particular churches or sects, or when it awards a preference or demerit on the basis of an official judgment as to the quantity, quality, or content of religious broadcasting--all of which it has done in reported cases.[3]

When Loevinger wrote, the FCC required license applicants to report what percentage of their broadcast time would be devoted to 14 different categories of programming, one of which was religion. The Commission then used these program time percentages to evaluate licensee applications, particularly in comparative hearings. Was this establishing religion? In no case was a license awarded solely because of a superior rating on religious program proposals,[4] although one applicant received a preference for proposing only .05% more religious programming than another--or about five minutes extra per week.[5] Loevinger felt this religious programming requirement and Commission rulings based on it caused a government agency to force religion upon licensees, an unconstitutional act.

Loevinger's attacks stopped suddenly in late 1965, at just the time

the FCC adopted new policies for comparative hearings.[6] Briefly, the policy statement said the Commission would no longer consider specific programming categories, including religion, in comparative hearings. Although no comment in the statement mentioned Loevinger's criticisms, the relationship seemed obvious.

Since then, religious broadcasting has flourished. In 1978, more than 450 radio stations listed religious formats,[7] and a new religious-format television station began operation every month.[8] Pat Robertson plans that his infant Christian Broadcasting Network, now with more than 800 affiliates and 24-hour-a-day programming broadcast via satellite, is a serious competitor to ABC, CBS and NBC.[9] The National Religious Broadcasters, a primarily evangelical Protestant group, has 1300 members, 1150 of them new in the last decade.[10] Religious broadcasting is a growth industry.

Whether this industry receives unconstitutional aid from the FCC is no less important a question because it has been neglected for almost a decade and a half.[11] In many areas of the relationship between the two institutions, neither the courts nor the commission has faced the constitutionality issue squarely.[12] This paper will examine the relationship between the Federal Communications Commission and religious broadcasting to determine if the FCC still "rushes in where other agencies fear to tread."

FCC policies and decisional processes will be scrutinized for evidence of systemic "establishment" of the institution of religious broadcasting. Further, the paper will review individual FCC cases involving religious programming and religious broadcasters. The paper also will review the constitutional meaning of the Establishment Clause and the limits the courts have set on governmental relationships with

religion in order to establish an analytical framework.

I. The Establishment Clause

Loevinger's view of religious liberty proposed an overly simplistic concept of the First Amendment. "When the Constitution says that Congress shall make no law, what it is saying is that the Federal government shall not act," he told a National Association of Broadcasters convention.[13] Even Justice Hugo Black, the most ardent constitutional absolutist, found some types of permissible government aid to religion, for instance granting school busing privileges to parochial school students.[14] In other instances, courts have refused to strike down such government aids to religion as released time instruction for students,[15] chaplains employed by prison systems,[16] selective service classifications for ministers and religious conscientious objectors,[17] use of public funds to build prison and military chapels[18] and religious hospitals,[19] the use of the phrases "In God We Trust" and "One Nation Under God" in government mottoes,[20] the use of prayers to open legislative assemblies,[21] and special tax privileges for church property.[22] That the meaning of the First Amendment is "government shall not act" is patently false.[23]

More instructive than broad declamations would be guidelines for the permissible limits of government involvement. The Court attempted such a definition of limits in Lemon v. Kurtzman,[24] where Pennsylvania and Rhode Island statutes providing salary supplements to parochial school teachers based on the number of secular classes taught were ruled unconstitutional. Chief Justice Warren Burger reviewed 70 years of cases to develop what has been called the "Lemon Test."

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many

> years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion". . . [25]

Thus, the Chief Justice developed a three-pronged test for evaluating whether a state action unconstitutionally establishes religion:

1. Is there a secular legislative purpose?
2. Does the action neither advance nor inhibit religion?
3. Does the action create excessive entanglement?

In order to pass constitutional muster, a law or administrative action must meet all three tests. For instance, a law which had a secular purpose and which did not have as a primary purpose advancing or inhibiting religion still could prove unconstitutional if it created excessive entanglement between organized religion and the government.[26]

Lemon arguably holds that legislation may include religious topics and touch religious organizations, but only if the legislation is intended primarily to achieve secular goals. The legislation also must not have an incidental side effect of either advancing or inhibiting religion. In Lemon, while the legislation had a primarily secular purpose -- paying salaries of teachers teaching secular subjects -- the incidental effect advanced religion, and the laws could not pass constitutional muster.

While the first two prongs of the Lemon test seem quite self-explanatory, "excessive entanglement" does not. The Chief Justice, noting that, explained:

> In order to determine whether the government entanglement with religion is excessive we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. . . Here we find that both statutes foster an impermissible degree of entanglement.[27]

The central clause of this test is the nature of the aid the State provides. Or, "Does the state provide aid to religious groups that it provides to none other?" Even then, as was the case in Lemon, the aid may not be impermissible. Only if the aid requires constant state attention does the legislation become "excessive entanglement."

II. The FCC Faces Religion

Religious broadcasting spans the entire experience of radio and television. The first remote broadcast was a church service.[28] Calls for curtailment of religious broadcasting soon followed; Literary Digest warned editorially in 1923 that broadcasting religious services would keep worshippers away from church and decrease contributions.[29] A decade later, the Rev. Dr. Shuler used religious air time to extort a $100 contribution by threatening to disclose intimate details about a person in a later broadcast; the FCC took the Reverend's station license away.[30]

Such FCC involvement creates the constitutionality issue. Religious broadcasts by local stations cannot violate the First Amendment since local stations are not government agents.[31] Without state action, there is no constitutional violation possible. FCC regulatory policy is state action, however, and it is in the relationship between the FCC and religious broadcasting that establishment violations would occur. And it is this area we now examine.

Applying the Lemon tests to the FCC's relationship with religious broadcasting and religious stations yields little evidence of unconstitutional establishment. For instance, even critics of FCC policies toward religious broadcasting refuse to rest their cases upon the "secular purpose" dimension of Lemon.[32] Indeed, more than 15 years ago, before the FCC dropped the inclusion of religion as one of its 14 programming categories, FCC Commissioner Kenneth Cox held that the commission had a

secular purpose. The Commission, in Cox's argument, was testing whether a licensee's service would be in the public interest.

Cox argued that the Commission had to include religion as one of its 14 programming categories in order to measure whether the licensee had been operating in the public interest.[33] Cox assumed, of course, the members of the public were interested in religion.[34]

Loevinger's thesis centered on the second prong of Lemon--that FCC action "advanced" religion.[35] Viewed with the luxury of hindsight, Loevinger's thesis is unsupported. If the growth of religious broadcasting were dependent upon the requirement that licensees carry religious broadcasts, as Loevinger argued, then a noticeable drop in religious broadcasting should have occurred in 1965 when the requirement was abandoned. However, the geometric expansion of religious broadcasting in the past decade refutes such a suggestion. The pre-1965 government action cannot be said to have created the current religious broadcasting behemoth.

The third Lemon test seems more applicable to religious ownership of broadcast outlets than to programming. But since the benefit--awarding of a license--is openly competitive for all, there is no special aid to religion that suggests the constant state attention criterion need be applied. Even if it were, religious stations require no more FCC attention than others; all broadcasters use the same reporting forms and meet the same requirements.

The FCC's relationship with religion passes these Lemon tests easily, it seems. One should be cautious of such quick conclusions, however. It is easier to prove unconstitutionality exists than that it does not. In the specific case at hand, to prove unconstitutional establishment one need merely find a violation, as Loevinger did.[36] To prove lack of existence, if that is possible at all, one must search every corner of the FCC's dusty halls to find traces of

chips from the First Amendment. Such a search demands that one be sure all of the hallways have been charted before beginning the examination. The entire scope of the FCC's relationship with religion thus must be charted.

For this study, all FCC cases which included any religious issues were analyzed. Four basic kinds of cases--or typologies--emerged:

1. Comparative Hearings on religious programming proposals.
2. Fairness Doctrine complaints about religious programs.
3. Petitions to Deny renewal or transfer applications because of religious programming.
4. Inquiries and Complaints about the propriety of ownership of broadcast stations by religious organizations.[37]

If no "establishment" is found in these areas, the study will conclude that none exists.

III. Comparative Hearings on Religious Programming Proposals

Loevinger's only evidence of unconstitutional relationships between the FCC and religious broadcasting was the practice of awarding preferences in comparative license hearings. While he conceded that no license had ever been awarded solely on the basis of religious programming preferences,[38] he argued that the FCC policy which created the possibility of awarding a license solely because of religious programming differences was a violation of the Establishment Clause.[39]

As we have noted, this changed. The 1965 FCC policy revision reversed a number of FCC practices, but not the basic objectives of the comparative hearings--determining which licensee would give the best practicable service to the public and which would achieve the maximum diffusion of control of mass media.[40] The FCC also continued to

maintain that one of the important ways to evaluate which applicant would give the best service practicable was to evaluate proposed programming. The Commission cited Johnston Broadcasting v. FCC[41] favorably: "In a comparative consideration it is well recognized that comparative service to the listening public is the vital element, and programs are the essence of that service." However, the Commission noted:

> The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time, and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time a successful applicant commences operation. Thus, the minor differences among applicants are apt to prove to be of no significance.
>
> . . . . . .
>
> Decisional significance will be accorded only to material and substantial differences between applicants' proposed program plans. . . Substantial differences will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service.[42]

The Commission's new policy was to avoid awarding preferences based on five-minute-per-week programming differences, thus silencing the religious unconstitutionality critics as well as others. But a footnote to that section of the policy statement noted that religious as well as other specialized formats would have to be evaluated:

> "Specialized proposals necessarily have to be considered on a case-to-case basis. We will examine the need for the specialized service as against the need for a general-service station where the question is presented by competing applicants."[43]

The policy statement terminated the awarding of preferences for slight differences, not only in religious but in all other categories. Since 1965, no comparative hearing has asked whether an applicant had enough religious programming proposed, although a few denial petitions brought by listeners have raised the issue. In those instances, the Commission has held that as little as 2% and as much as 37% religion were both adequate

and within the wide latitude of licensee discretion in programming.[44]

Much more frequent have been the cases requesting the FCC to choose between competing applications for a general and religious format.[45] For instance, in 1971 the FCC had to choose between four competing applicants for a license in Mobile, Ala.; a Black, a religious, and two general formats.[46] The hearing said the proposed formats had to be measured against community needs. In order to fulfill its obligation to license stations which would serve the public interest, the FCC had to measure the worth of religious programming. To ignore religion altogether, especially if there were already a religious format station in Mobile and no Black station, would be to do an injustice to the listening public.

To date, no religious format has ever received a preference, or demerit, in a comparative hearing. The FCC standard's strictness may prevent it from ever happening. "Program format is a matter of licensee judgment," the Commission held. "Program differences of two applicants can be considered only to the extent that they go beyond ordinary differences in judgment and show superior devotion to public service."[47] One doubts that religious programming will ever show "superior devotion to public service."

While the FCC's actions have not established religion, the more theoretical question remains: Does the inclusion of the possibility of granting preferences to a religious-format applicant establish religion unconstitutionally? Again, we turn to the Lemon test. The regulation has a secular purpose--to achieve the best practicable service to the public. Second, the regulation's primary effect neither advances nor hinders religion--it strives to measure how well the applicant will serve the public interest. Finally, the regulation does not foster an excessive entanglement; the FCC is involved less in measuring amount and type of religious programming,

and in fewer comparative hearings, than it previously was. There is no establishment.

IV. Fairness Doctrine Complaints About Religious Programs

The FCC's repeated denial of Fairness complaints about religion has galled many observers, especially atheists.[48] They claim the exclusion of religion as a controversial topic of public importance establishes a special privilege for religious broadcasters. Neuhaus summarized their feelings that the FCC was knuckling under to pressure from religious interests: "Anyone who thinks the FCC decisions in this matter derive solely from consideration of constitutional issues would also buy a used golf cart from the Rev. Billy Graham."[49]

What is particularly galling to Neuhaus and his coterie is the FCC's willingness to consider religious programming in many contexts other than the Fairness Doctrine. For instance, not even advocates of current FCC policy would deny the FCC authority to condemn and punish scoundrels such as Shuler.[50] Scalawags have never been able to hide under the cloak of religion. Recently WOOK in Washington, D.C., lost its license for allowing radio preachers to broadcast tips on the numbers game. The tips were given as Bible texts. "Psalm 48 and 1 is the key," or "I blessed you Monday straight. Psalm 21 and 8." WOOK defended its practices on absolutist religious liberty grounds. "The FCC may not inquire into the truth or falsity of what is preached as religion." The Commission refused to accept such a First Amendment interpretation, holding that "in view of the fact that numbers references are not part of any religious creed" the license could be revoked.[51] "It is well understood that licensees cannot engage in criminal conduct simply because it is embedded in a program of religious values."[52] For the FCC to leave such conduct unreprimanded

would be for it to fail in its obligation to see that spectrum space serve public needs.

The FCC's regular denial of religious-based Fairness Doctrine complaints led some to conclude that it was failing to protect the public interest in promoting open discussion.

But KVOF, a religious television station operated by Faith Center in San Francisco, learned differently.[53] Homosexuals complained that Anita Bryant's strident attacks on them during "The 700 Club" constituted a Fairness violation. KVOF argued that it was protected from the Fairness Doctrine by the religion exemption: "Although Ms. Bryant's discussion had clear social and political overtones, the discussion just as clearly relied on religious doctrine and belief and was thus outside the purview of the Fairness Doctrine."[54] Not so, the FCC responded:

> While the Commission has not held that the Fairness Doctrine is applicable per se to the broadcast of church services, devotions, prayers or other material of this nature, such programs can include vigorous expressions of views on genuinely controversial issues. Thus, to the extent that any program, regardless of label, deals with a controversial issue of public importance, the Fairness Doctrine applies.[55]

Obviously, no special category of Fairness unfairly establishes religion. That reasoning has pervaded FCC decisions over the last 30 years, but critics have chosen not to notice it. For instance, as early as 1950, the FCC refused to declare all religious programs exempt for attack rules.[56] Likewise, a decade later, the FCC refused to allow the National Council of Churches of Christ to drop the sponsor identification from their 60- and 90-second Public Service Announcements. The Commission specifically noted Fairness problems that could arise if the spots discussed public controversy topics, even in a religious setting.[59]

Lacey quotes Davey Johnson v. KHEP[58] in arguing that the FCC still exempts religious programs from Fairness consideration.[59] She agrees with the decision: "The Commission knows of no substantial question in this country concerning the merits of religion and it does not hold that the Fairness Doctrine is applicable to the broadcast of church services, devctions, prayers, religious music or other material of this nature."[60] But she fails to note the qualifiers the FCC attached to that conclusion. The Commission outlined five steps Johnson should have followed in order to have his petition considered. They were:

1. Present a summary of the broadcast in question.
2. Show the date and time of the broadcast.
3. Explain why the broadcast presented a controversial issue of public importance.
4. Establish reasonable grounds for saying that only one side of the issue was presented.
5. Determine whether the station intends to broadcast more viewpoints on the controversial issue.

In summary, the FCC said it was denying the complaint because Johnson did not meet the showing required. The obvious inference was that if he had met the requirements the FCC would have invoked the Fairness Doctrine.[61]

Thus, the entire argument that religion has been exempt from the Fairness Doctrine crumbles. Previous Fairness complaints had been denied only because the complaint failed to show the requisite facts for invoking the Fairness Doctrine.[62] The Commission's reasoning was that sermons are no more and no less violations of Fairness Doctrine than are interviews, syndicated columnists or call-in shows. To make

sermons suspect would be as impermissible as to make them exempt. The burden of proof, when it was finally met, demonstrated the Commission's own fair treatment of religion, neither advancing nor hindering it.

Consider the alternative, that every minor squabble over interpretation of Scripture would be subject to government agency review. For instance, Rex Humbard blesses his thousands of parishoners who have gathered to worship on "the Lord's Day, His Sabbath." The FCC would be attacked immediately with Fairness Doctrine complaints from Seventh-day Adventists, Seventh-day Baptists and probably Jewish congregations complaining that a controversial issue of public importance--which day of worship is God's Holy Day--has been presented unfairly, and that they should be allowed rebuttal time. Similar issues within Christendom exist over the meaning of hell, what happens at death, the second coming of Jesus Christ, the proper mode of baptism, the existence of an anti-Christ, and a host of no more consequential doctrines. To involve the FCC in these internecine disputes is to entangle the Commission and more surely violate the constitution than the present system does. The alternative is far worse than the current practice.[63]

Based upon this review of KVOF, the history of Fairness Doctrine complaint denials and the examination of the alternatives, we must conclude that no establishment exists in this area.

V. Petitions to Deny Renewal and Transfer Applications

Little reason appears evident to even question the impropriety of FCC consideration of religiously-based petitions to deny.[64] The petitions, filed by interested citizens, frequently raise public interest, convenience or necessity issues that the FCC must judge in order to be sure the best possible use of spectrum space is being made.[65] The secular purpose test

is met, and no more entanglement is fostered with religious petitions than with others. Further, ignoring these petitions would more likely cause establishment than considering them does since it would let religious stations operate without being forced to meet the public interest test, thus giving religious stations a special privilege not accorded all others.

In practice, consideration of these petitions may be mere formality. Petitions to deny are themselves routinely denied. As previously noted, 2% religious programming was not too little, while 37% was not too much.[66] In petitions to deny transfers, Los Angeles and Seattle listeners were unable to stop the loss of a religious format station, while Hartford and Versailles, Ky., listeners could not prevent the addition of new religious licensees.[67] In denying the Los Angeles and Seattle listeners their religious station, the FCC cited the other religious stations available, as well as religious programs on general format stations. Hartford and Versailles listeners, however, were told that the religious stations would program significant amounts of non-religious, local content. In all four instances, the secular purpose of the FCC is shown, with the primary effect of serving the public interest. No establishment exists here.

VI. Religious Ownership

As early as 1959, when the D.C. Circuit held that Catholic Loyola University could be a licensee despite both religious and foreign-owner questions,[68] rights of religious groups to hold broadcast licenses were clear. Just as in Fairness, to deny the right of a religious group to broadcast would be as injurious of First Amendment freedoms as to accord them special privileges or segments of the broadcast band.[69]

More recently, in King's Garden v. FCC[70] the D.C. Circuit reaffirmed the rights of religious organizations to receive broadcast licenses, albeit subject to normal FCC regulation:

> As a government agency, the Commission is enjoined by the First Amendment to observe a stance of neutrality toward religion, acting neither to promote nor to inhibit religion. Under principles of neutrality, a religious group, like any other, may become a broadcast licensee, and like any other licensee, a religious group is subject to "enforceable public obligations."[71]

These cases leave little doubt that granting a license to a religious group does not violate the Establishment Clause.

Indeed, discrimination against rather than for religion may be evident in recent FCC treatment of religious license applications. Religious-format stations are required to promise that they will broadcast a wide variety of religious views;[72] in one case, the applicant even had to certify in writing that all 100 churches and synagogues in the community had been informed that free air time was available before the license would be awarded.[73] Such contortions are not required of other specialized format applicants. For instance, the FCC has never required a Black-format applicant to certify that all Black groups in town have been notified of the availability of time.

Further, it is difficult to imagine an FCC requirement that a Black-format station be required to present "Uncle Tom" views, and to present them free. Yet just such a requirement exists for religious-format stations. The added burden imposed upon the religious owner may well violate his equal protection rights. This possible FCC infringement of religious broadcasting rights is one deserving of study, although equal protection violations are outside the scope of this paper.

A different question of rights of religious ownership was raised in

1974 when a petition filed by activists Jeremy Lansman and Lorenzo Milam asked the FCC to freeze the awarding of educational band frequencies to religious colleges.[74] They questioned whether such insitutions as Moody Bible Institute or Nazarene Theological Seminary deserved to be granted frequencies in the section of the FM band reserved for noncommercial broadcasting.

> We are convinced that the problem is one of scope and vision. Religions, traditionally, over the centuries--have been the repository of history, ethics, facts, apocrypha, and knowledge . . . It seems to us that particularly American institution--"back to the Bible," fundamentalism--The Gospel is ultimately vacuous when it comes to knowledge, history, the spirit of learning, because of its dependence on only the Bible, and its exclusion of the ideas, commentaries, and thoughts of man through history, through time.[75]

Religious broadcasters immediately attacked Lansman-Milam as a "Petition Against God." More than 1.5 million letters descended upon the FCC within nine months.[76] Many of the letters mistakenly thought that the petition would ban religion from the airwaves, rather than merely stopping the awarding of further noncommercial licenses. The petition, though obviously antagonistic to Christian religion,[77] made no mention of denying airtime to preachers, nor did it make reference to the awards of licenses on portions of the FM or AM band not reserved for noncommercial educational programming.

The Commissioners noted the inherent unfairness of what Lansman-Milam asked:

> Petitioners would have us disqualify all religiously-affiliated organizations and institutions from eligibility to operate on reserved channels. In effect they would have us practice discrimination against a school or university simply by virtue of the fact that it is owned and operated by a sectarian organization.[78]

The Commission then stated its policy regarding applicants for reserved FM channels:

> In observing the priniciples of neutrality we treat religious organizations and secular organizations alike in determining eligibility for operation on a reserved channel. . .
>
> Taken in this context, we view Petitioners' proposals on religious applicants for reserved FM and TV channels as an impermissible proposition, which would violate our neutrality just as much as if we were to favor religious applicants over secular ones. The pleadings indicate Petitioners personal distaste for most religious programming and espouse their own views for improving such programming. The Commission, even if it were disposed to, cannot cater to personal views. Nor is it empowered to enforce or enhance private rights.[79]

Like the Fairness policy, the FCC had routinely considered the nature of the organization asking for a reserved channel, and had turned down at least two religious applicants during the four years immediately preceding Lansman-Milam.[80] In both Keswick Foundation[81] and Moravian Bible Church,[82] the FCC had held that churches could not receive reserved-band licenses, even though the pastors of the churches contended that their religious work was primarily educational.[83]

Thus, the Lansman-Milam petition appears to be superfluous, perhaps even an attack on religion in violation of the Free Exercise clause. Whatever, the FCC denied the petition.[84]

This review of FCC actions regarding religious ownership creates suspicion that religious broadcasters may be discriminated against rather than established, both in the spurious petitions and in the special programming requirements asked of religious-format stations.

VII. Conclusion: No Establishment

This analysis has failed to find evidence that the FCC establishes religion in contravention of the Establishment Clause. Those areas which have presented the most serious questions in the past--Fairness Doctrine and Programming Report--have been answered. The Fairness Doctrine applied to religious programs all along; complainants just never met the normal

burden of proof. The Programming Report has been modified so that religious programming is not now reported in the license application.[85] Having thus swept even the corners clean, the Establishment Clause still is found intact in the First Amendment, with not even its dust or chips lying in the FCC building's religious halls.

A potentially bothersome development outside the scope of this paper is a notice of inquiry for rulemaking about adding a new category to the program reporting requirements--community service.[86] The innocuous-sounding category was proposed by a religious coalition and seems tailored for religious programs. The FCC, having once abandoned religion as a category, should not adopt it in another name. However, the inquiry has been left out of this analysis, since few petitions survive the inquiry stage to reach rulemaking.

In summation, while the FCC has failed to knock down the wall between church and state, it continues to be presented with ladders for crawling to the very top of the wall. The FCC has refrained from using these ladders in similar situations in the past; there is no reason to doubt the Commission's judgment now any more than before. From this analysis, the growth of the religious broadcasting industry noted earlier must find its source in factors other than unconstitutional FCC aid.

FOOTNOTES

[1]See among other sources, Loevinger, Religious Liberty and Broadcasting, 33 GEORGE WASHINGTON LAW REVIEW 631 (1965); Loevinger, Broadcasting and Religious Liberty, 9 JOURNAL OF BROADCASTING 3 (1964). Loevinger presented the same thesis in a speech to the National Association of Broadcasters, Spring, 1964, and in an interview on WTTG, Washington, D. C., August 1, 1965. Loevinger's fellow FCC Commissioner Kenneth Cox replied to the assertions of unconstitutional establishment in Cox, The FCC, The Constitution and Religious Broadcast Programming, 34 GEORGE WASHINGTON LAW REVIEW 196 (1965). Many of Loevinger's unpublished and unreported critiques are referred to in Cohn, Religion and the FCC, THE REPORTER 32 (January 14, 1965). Recently, the unconstitutionality argument has been revived by Lacey, The Electric Church: An FCC-"Established" Institution?, 31 FEDERAL COMMUNICATIONS LAW JOURNAL 235 (1979).

[2]"Congress shall make no law respecting an establishment of religion. . ." U. S. Constitution, Amendment 1

[3]Loevinger, Religious Liberty and Broadcasting, note 1 supra at 657.

[4]This fact was central to Cox's defense of the then-current FCC policies. See Cox, note 1 supra.

[5]Richmond Newspapers, Inc., 11 RR 1234 (1955).

[6]Policy Statement on Comparative Broadcast Hearings, 5 RR2d 1901 (1965). This statement supplemented an earlier report but did not replace it. That report is Commission Policy on Programming, 20 RR 1901 (1960).

[7]Source: BROADCASTING YEARBOOK '78 (1978). For a current review of broadcasting as an industry, see The Electric Church: Religious Broadcasting Becomes Big Business, Spreading Across U.S., WALL STREET JOURNAL 1 (May 19, 1978).

[8]NRB Convention, 21 CHRISTIANITY TODAY 56 (February 18, 1977).

[9]Barrie Doyle, Christian Broadcasting Network, 18 CHRISTIANITY TODAY 41 (February 1, 1974), and Network for Yahweh, 106 TIME 65 (July 21, 1975).

[10]note 8, supra.

[11]Only Lacey has reviewed the question since 1965, and her review ignores the change in comparative hearings that formed the heart of Loevinger's argument. Other than Lacey, only Robert Smith, who thought the FCC's position on religious broadcasting failed to serve the public interest, has commented on the question. Smith, in a very tortured argument

[11](ctd) that required a novel First Amendment interpretation and distinction between liberty and freedom, argued that religious freedom demanded FCC intervention and regulation. His plan called for the FCC to scrutinize all religious programs to insure that local broadcasters controlled program content rather than allowing religious groups to control the content. See Smith, Broadcasting and Religious Freedom, 13 JOURNAL OF BROADCASTING 1 (1968).

[12]See notes 49-53 infra for the few examples of constitutional considerations.

[13]As quoted by Cohn, note 1 supra at 33.

[14]Everson v. Board of Education, 330 U.S. 1 (1947).

[15]Zorach v. Clausen, 343 U.S. 306 (1952).

[16]Abington School District v. Schempp, 374 U.S. 203 (1963), (J. Brennan concurring opinion). But see O'Malley v. Brierley, 477 F2d 785 (3d Cir. 1973).

[17]For a summary of recent draft cases, see Fein v. Selective Service, 405 U.S. 365 (1972).

[18]Nelson v Heyne 355 F. Supp. 451 (N. D. Ind. 1972), aff'd and remanded for further proceedings on other grounds, 491 F2d 352 (8th Cir. 1973); and Anderson v. Laird, 466 F2d 283 (D. C. Cir. 1972). In Anderson, the court held that compulsory attendance for military cadets was unconstitutional but the building of chapels with government money was permissible.

[19]Bradfield v. Roberts, 175 U.S. 291 (1899).

[20]As noted by Stone, Update: Prayer in Public Schools, U. S. NEWS AND WORLD REPORT 100 (October 16, 1978).

[21]id.

[22]Walz v. Tax Commission, 397 U.S. 664 (1970).

[23]For a general discussion of the Establishment Clause, see Chase and Ducat, THE CONSTITUTION (1973) at 269-277; Miller and Flowers, TOWARD BENEVOLENT NEUTRALITY (1977) at 297-568; Kurland, RELIGION AND THE LAW (1962); and Pfeffer, CHURCH, STATE, AND FREEDOM (1953); and Washaw, RELIGION, EDUCATION, AND THE SUPREME COURT (1979).

[24]403 U.S. 602 (1971).

[25]id at 612.

[26]Walz v. Tax Commission, note 22 supra.

[27]ibid at 615.

[28]Wineke, Religious Radio, 1921-1971, 15 CHRISTIANITY TODAY 7 (January 1, 1971).

[29]Is Radio Hurting the Church?, 82 LITERARY DIGEST 31 (1923).

[30]Trinity Methodist Church, South v. FRC 62 F2d 850 (D.C. Cir. 1932).

[31]Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973). But see Justice Brennan's dissent in the same case.

[32]For example Lacey, who believes the FCC is unconstitutionally establishing religion, refuses to base her argument upon the secular purpose clause. "Although cynics and critics often accuse the Commission of being a captive of the industry it regulates, no one to date has accused it of being a captive of a particular religious group." Lacey, note 1 supra at 268-9.

[33]Cox, note 1 supra.

[34]The definitional dilemma of what constitutes "the public interest" has plagued many authors besides Cox. For a review of the public interest concept see Dennis, The Press and the Public Interest: A Definitional Dilemma, 23 DEPAUL LAW REVIEW 937 (1974).

[35]Loevinger concluded that including religion as one of the 14 categories of programming which all broadcasters had to report gave official blessing and authority to religion:

> The FCC decisions and practices in this area leave no room for doubt that the Commission has established religion as a required element of broadcasting service and has applied this standard to mean such religon as meets the FCC definitions and notions of acceptability. The Commission has never discussed or considered whether any different considerations or legal rules apply to its requirement of religious programs than to other types of programs. . . .(T)he Commission specifies in its application forms and in its statements and opinions the particular elements and kinds of programming which it asserts to be in the public interest. It plainly exerts official authority and influence in favor of the types of programs specified. In first amendment cases the Supreme Court has viewed such action as this as not materially different from official coercion. Loevinger, note 1 supra at 653-5.

[36]Loevinger found 24 cases demonstrating the FCC establishment of religion, but all were repetitions of the same FCC policy — the comparative hearings policy cited at note 6 supra. See notes 38 - 47 and surrounding text, infra, for a discussion of recent changes in the FCC's policies regarding comparative hearings.

[37]Lacey, note 1 supra, used essentially the same typology, although her category titles varied. She reviewed the Comparative Hearing cases under the title "FCC Policies Encouraging Religious Programming on Commercial Broadcast Stations." The Fairness Doctrine questions she placed in a section titled "FCC Policies Regarding the Content of Religious Programs." Questions of religious format and religious ownership, which are considered in this paper in sections V and VI, were summarized by Lacey in "FCC Policies Regarding Allocation of Noncommercial Educational Radio and Television Stations to Religious Broadcasters."

[38]Loevinger paid special attention to one particular comparative hearing -- Sucesion Luis Pirallo-Castellanos, 16 RR 113 (1959). In Sucesion, a governmental agency was competing with a private organization for a license to broadcast in Mayaguez, Puerto Rico. The governmental agency was forbidden by state law to promote -- in this instance, broadcast -- religion, and thus was awarded a demerit in the comparative hearing. However, other factors denied the license to the private organization and awarded it to the governmental agency.

[39]Loevinger, note 1 supra, at 648-9.

[40]note 6 supra.

[41]175 F2d 351 (D.C. Circ. 1949).

[42]ibid at 1911.

[43]id.

[44]Evening Star Broadcasting Co., 20 RR2d 1311 (1971); and Harvit Broadcasting Co., 18 FCC2d 508 (1969), respectively.

[45]Cases involving comparative hearings about religious formats since the 1965 polciy change include Flint Family Radio, 41 RR2d 1155 (1977); Gospel Broadcasting Co., 17 FCC2d 130 (1969); KCOD Broadcasting, 11 FCC2d 349 (1968); Quest for Life, Inc., 12 RR2d 392 (1968); and Lorenzo Milam and Jeremy Lansman, 9 RR2d 204 (1967). An earlier case, M & W Co., 22 RR 8 (1961) pointed out the weakness of the FCC comparative hearing policy prior to 1965; in M & W Co. a religious format applicant could not be compared with a general format station.

In addition to the comparative hearings cited above, religious formats have been set as issues for comparative hearings in Sandern of Iowa, Inc., 20 FCC2d 546 (1969); Harrison Radio, Inc., 16 RR2d 1123 (1969); and KZNG Broadcasting Co., 14 RR2d 960 (1968). A religious format was not set for comparative hearing in Dennis A. and Willard D. Sleighton, 1 FCC2d 421 (1965).

[46]WABB, Inc., 29 FCC2d 419 (1971).

[47]RAM Enterprises, 35 RR2d 1507, 1517 (1976).

[48]The most frequent complainant has been Robert Scott. See Robert H. Scott, 25 RR 349 (1963) or Robert H. Scott, 5 RR 859 (1949) or Robert H. Scott, 3 RR 259 (1946). A 1970 complaint of Scott's that references to God on "Romper Room" were Fairness Doctrine violations is reported in Creeping Piety on Romper Room, 78 BROADCASTING 29 (May 4, 1970). However, Scott has not been the only complainant; see also Mrs. J. C. Crampton, 56 FCC2d 854 (1975); Davey Johnson, 54 FCC2d 923 (1974); and David S. Tillson, 19 FCC2d 511 (1969).

[49]Neuhaus, Praise the Lord on TV, 38 HUMANIST 6 (January/February 1978).

[50]See note 30 supra.

[51]United Broadcasting, 55 FCC2d 416 (1975).

[52]This general policy statement was made three years later in a case almost identical to United Broadcasting. See Gilbert Broadcasting Corp., 43 RR2d 51 (1978).

[53]Council on Religion and the Homosexual, Inc., 43 RR2d 1581 (1978).

[54]id at 1589.

[55]id at 1588.

[56]The American Council of Christian Churches had petitioned to deny a WCBS license renewal because WCBS had discriminated against ACCC radio programs in refusing to air them. WCBS responded that the ACCC programs often attacked the religious views of others, and thus the programs were denied air time. The FCC held:

> "We cannot say that a station operates contrary to the public interest because it restricts the use of radio time, given free to the various religious denominations in the community. . ., to the purposes for which the time was intended and refuses to allow any of the participants to make attacks on other church groups or to engage in any name calling." American Council of Christian Churches, 43 FCC 502 (1950).

The American Council of Christian Churches presented an obvious opportunity for the FCC to declare religious programs exempt from the Fairness Doctrine, and the FCC passed by the opportunity.

[57]National Council of Churches of Christ, 44 FCC 2246 (1960).

[58]Davey Johnson, note 48 supra.

[59]Lacey fails to note the KVOF case, notes 53 - 55 supra. That FCC decision contradicts much of Lacey's argument that religion is exempt from the Fairness Doctrine.

[60]ibid at 924, as quoted by Lacey, note 1 supra, at 254.

[61]The inference is supported by Council on Religion and the Homosexual, Inc., note 53 supra.

[62]The requirements are outlined in Davey Johnson, note 40 supra. These requirements, as specifically related to religious issues, were upheld in Mark v. FCC, 468 F2d 266 (D. C. Cir. 1972). In Mark, an astrologer's claim of Fairness Doctrine rights to discuss astrology's opposition to Christianity during a Johnny Carson show was denied by the FCC and the court.

[63]A Dayton (Ohio) Daily News cartoon showed a person with pitch fork and forked tail entering a radio studio just as an obviously-Fundamentalist preacher was leaving. The announcer was saying, "Thank you, Reverend. Now, in compliance with an FCC ruling, here to represent the opposition. . ." The cartoon is reprinted in 51 SATURDAY REVIEW 43 (May 4, 1968).

[64]Petitions to Deny license renewals were filed in KCOP Television, Inc., 37 RR2d 1051 (1976); KIRO, Inc., 36 RR2d 673 (1976); RKO-General, 29 RR2d 1459 (1974); and Ethel C. Hale and W. Paul Wharton, 15 RR2d 458 (1969). The FCC's general policy statement was made in response to a Black programming Petition to Deny in Rust Communication Group, 38 RR2d 1593, 1594-5 (1976):

> "The amount of non-entertainment programming to be broadcast is a matter to be left solely to the discretion of the licensee, limited only by its responsibility to respond to the problems of the community. Absent a specific showing that licensee's proposal . . . would be inadequate to respond to the problems of the community, . . . the licensee's proposed programming [is assumed to be] adequate to serve community needs."

Petitions to Deny transfers were filed in Chronicle Broadcasting Co., 59 FCC2d 335 (1976) and Corvallis Cable TV Co., 37 RR2d 1045 (1976).

[65]Citizen's Committee v. FCC, 436 F2d 263 (1970), established the right of the FCC, indeed the necessity, to evaluate the programming content of both the old licensee and the new in transfer application cases.

[66]note 37 supra.

[67]Biola Schools and Colleges, Inc., 21 RR2d 1275 (1971); Walter E. Webster, Jr., 28 RR2d 773 (1973); RKO-General, 23 RR2d 930 (1972); and Mr. and Mrs. Richard Holt, 27 RR2d 1605 (1973), respectively. The Hartford transfer decision was affirmed in Hartford Communication Committee v. FCC, 24 RR2d 2160 (Court of Appeals, D. C. Cir., 1972).

[68]Noe v. FCC, 260 F2d 739 (D. C. Cir. 1958).

[69]Reservation of certain frequencies for religious organizations has been proposed several times. A proposed Section 307(c) for the 1934 Communications Act asked the FCC to allocate a fixed percentage of broadcast facilities to non-profit programmers, including religious organizations;

[69](ctd) the section was dropped from the final Act but has appeared in the "educational band." In 1951, the Radio Commission of the Southern Baptists asked the FCC to reserve certain FM frequencies for religious stations, although the petition was quickly amended to include all non-profit groups. The FCC denied the petition, but not on constitutional grounds; not enough demand for the stations was shown, the FCC said. See Southern Baptist Convention, 1 RR 571 (1951).

[70]498 F2d 51 (1974).

[71]id at 59.

[72]Christian Radio Fellowship, Inc., 29 F[illegible] 3 (1971); Moravian Bible Church, 28 FCC2d 1 (1971).

[73]KCOD Broadcasting, 11 FCC2d 349 (1968).

[74]Petition for Rulemaking, Number RM-2493, December, 1974. The petition was denied in Multiple and Religious Ownership of Educational Stations, 34 RR2d 1217 (1975).

[75]Petition, note 74 supra, at Sections 22 and 23, as quoted by Lacey, note 1 supra, at 238.

[76]The tremendous rush of mail supports the thesis of Cox, note 1 supra, that the FCC had to consider the amount of religious programming because a large percentage of the public was interested in it. However, the volume of mail does nothing to support or refute Cox's definition of "public interest." See note 34 supra.

[77]See the quotation in the text at note 75 supra. Their petition also referred to the growth of religious broadcasting as "cancer-like." They called religious programming "mindless" and "banal." The petition spoke of an "attack" on television bands by religious licensees and of the "invading" of commercial stations by religious programs.

[78]Multiple and Religious Ownership of Educational Stations, note 74 supra, at 1226.

[79]id at 1226-7.

[80]The two cases are Keswick Foundation, 26 FCC2d 1025 (1975) and Moravian Bible Church, 28 FCC2d 1 (1971). A third application by a religious organization was held in limbo for several years and finally withdrawn. See National Educational Fellowship, 24 FCC2d 223 (1969).

[81]Note 80 supra.

[82]Note 80 supra.

[83]Some observers note that Jesus charge to his followers, as quoted in Matthew 28:19, 20, was an educational one:

> "Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost; Teaching them to observe all things whatsoever I have commanded you; and, lo, I am with you alway, even unto the end of the earth." (Emphasis mine)

For a more complete explication of views about religious education, see White, EDUCATION (1903).

[84]Note 74 supra. Commissioner Margita White took the awarding of licenses to Moody Bible College as an opportunity to question FCC policies for religious educational stations. The different requirements established for awarding educational band frequencies to churches and church colleges, she argued, may violate the First Amendment by requiring more of religious organizations than of others. Moody Bible Institute, 40 RR2d 1264 (1977). For cases demonstrating this discrimination between religious and other applicants for educational band frequencies, see Pacifica Foundation, 24 FCC2d 223 (1969); Moravian Bible Church, note 80 supra; Pensacola Christian School, 41 FCC2d 24 (1973); and Keswick Foundation, note 80 supra.

[85]Form 303, the reporting form for renewal applications, was modified in 1976 and no longer contains any reference to religion or religious programming. The only types of programming now reported to the FCC are 1) news, 2) public affairs, and 3) other non-entertainment or non-sports programming. Presumably, the third category would include religion, although religious news programs could conceivably be reported in the first category, especially on religious-format stations where a religious newscast is a regular part of the broadcast day. It is also possible that a discussion of a current topic such as abortion or homosexuality on a religious program could be classified as public affairs. See Council on Religion and the Homosexual, Inc., note 53 supra.

[86]Notice of Inquiry, Docket #78-335, October 25, 1978.